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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 240

JOSEPH COVELLO, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for Rehearing from the Denial of the Petition for a Writ of Certiorari

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PETITIONER'S REPLY TO MEMORANDUM IN OPPOSITION

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I

The Government urges that the merits of the question presented by the Petition for Rehearing should not be reviewed because, in the Government's view, Rule 58(2) " . . . refers to '*grounds* * * * confined to intervening circumstances,' . . . but does not suggest

that new *questions* may be presented as a result of intervening circumstances." (Memorandum in Opposition, p. 2, n. 1; emphasis added by Government.)

However, Rule 58(2) is not properly subject to the Government's narrow interpretation. The Rule does suggest that new questions may be presented, since it cites an example of such a case in the text of the Rule:

> "Any petition filed under this paragraph must briefly and distinctly state grounds which are confined to intervening circumstances of substantial or controlling effect (e.g. Sanitary Refrigerator Co. v. Winters, 280 U.S. 30, 34, 50 S.Ct. 9, 10, 74 L.Ed. 147, footnote 1; Massey v. United States, 291 U.S. 608, 54 S.Ct. 532, 78 L.Ed. 1019), ..." Rule 58(2), Supreme Court Rules.

The *Massey* case, thus cited, is a criminal case in which the question presented on rehearing was not presented in the certiorari petition. The question was presented on rehearing because of an intervening decision of this Court. Other more recent examples of criminal cases in which this Court granted a petition for rehearing presenting a question not raised in the previously denied certiorari petition are *Kolod* v. *United States,* 390 U.S. 136 (1968) (granting petition for rehearing and vacating order denying certiorari) and *Black* v. *United States,* 385 U.S. 26 (1966) (same).

II

The Government's basic position on the merits is that Congress, in enacting Section 605 of the Communications Act of 1934, did not intend to restrict law enforcement agents' access to telephone company toll records of subscribers' interstate calls. (See Memorandum in Opposition, pp. 5-7). In the Government's

view: "Toll slips, after all, are not the types of record which are inherently intended to be private. They should not be deemed privileged in the absence of a clear Congressional intent against disclosure." (Memorandum in Opposition, p. 6.)

The Government's argument bears a remarkable similarity to the argument made by the Government in the first *Nardone* case, when this Court first construed Section 605. The Government there argued that Congress, in enacting Section 605, had not intended the Section's prohibitions against wiretapping to apply to law enforcement officers.

> "It is urged [by the Government] that a construction be given the section which would exclude federal agents since it is improbable Congress intended to hamper and impede the activities of the government in the detection and punishment of crime. The answer is that the question is one of policy. Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty." *Nardone* v. *United States,* 302 U.S. 379, 383 (1937).

This Court in *Nardone* noted the absence of any contemporary legislative history showing the Congressional intent behind Section 605. Accordingly, the Court construed the statute in accordance with its "plain words", instead of reading in the exception for government agents which the Government urged. *Nardone* v. *United States,* 302 U.S. 379, 382. Petitioner urges that no similar exception be read *sub silentio* into the Section 605 prohibitions against disclosure of toll records, without the case being heard upon the merits.

It is doubtful that the ordinary telephone subscriber considers that the identity of the subscribers whose numbers he calls is an open book, for Government or private investigators[1] to scrutinize. If that is the meaning of the law, it should obviously be a uniform law, applicable throughout the interstate telephone system—in Ohio as well as New York. The Government's and Second Circuit's construction of Section 605 as inapplicable to telephone toll records is irreconcilable with the view of the Sixth Circuit majority and dissent in *DiPiazza and Deming* v. *United States,* 415 F.2d 99 (6th Cir. 1969) (reprinted in the Appendix to the instant Petition for Rehearing), petitions for certiorari pending, Nos. 960, 965, O.T. 1969,[2] "that telephone company toll records containing an individual's long distance calls are protected by § 605 of the Communications Act." (Petition for Rehearing at p. 11a. See also *id.* at p. 5.) The conflict should be resolved by this Court; and nothing in the Memorandum in Opposition gainsays the importance of such an authoritative resolution.

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[1] *E.g.*, it appears from press accounts that records of toll calls charged to Senator Edward Kennedy's credit card had been divulged to a newspaper, the *Manchester Union Leader.* See Denniston, "Phone Caller's Right to Privacy", *Washington Evening Star,* January 9, 1970 (editorial page); "Telephone Official Among Nine Called for Kopechne Inquest", *Washington Evening Star,* August 30, 1969 (news section, AP dispatch).

[2] The Government's time for filing its responses to these petitions has been extended from January 18 to February 15, 1970.

The *DiPiazza* Court divided only as to whether the summons issued for the toll records was valid process. But in the instant case, no process was sought or obtained by the F.B.I.; and no showing of probable cause could possibly have been predicated upon the letter of an allegedly anonymous informant (542a), whose identity the F.B.I. professedly made no attempt to ascertain. (85a.)

Nor can the conflict between the Circuits in statutory construction be avoided by the Government's belated suggestion that the telephone company was entitled to disclose to the F.B.I. records of Merrill Garfinkel's toll calls, made to petitioner and others, in order to take "measures to protect its revenues." (See Memorandum in Opposition, pp. 4-5.) This ground for admissibility of the toll slips was never urged by the Government in the District Court. Thus there is no record or findings directed to the issue of whether the telephone company disclosed the records of its subscriber, Howard Garfinkel, for the alleged purpose of protecting its revenues or for the purpose for which the disclosure was in fact used in this case, namely to aid the F.B.I. in an investigation of interstate gambling.[3] The Government first raised this ground for admissibility in its answering brief in the Court of Appeals, and it was not accepted by the Second Circuit. The Court of Appeals, like the District Court, held the toll records admissible on the broad ground that § 605 had no application to disclosure of toll records—not on the narrow ground that the disclosure herein was within some statutory exception for investigations of telephone fraud. (See Pet. App. 10a; 401a.)

By failing to raise the ground in the District Court, where an appropriate record could have been made, the Government may well be foreclosed from urging it in this Court even if plenary review is granted. Compare *Giordenello v. United States*, 357 U.S. 480, 487-88 (1958). But in any event, the Government's argu-

[3] Nor was there any finding as to the authenticity of the "anonymous letter" on which the Government's argument is predicated (Memorandum in Opposition, p. 2).

ment is extremely tenuous on the existing record. The justification now urged for the telephone company showing the F.B.I. the toll records of a subscriber, Howard Garfinkel—that the telephone company received a letter from an allegedly anonymous informant saying that *Merrill* Garfinkel was using ficticious credit cards to make long distance phone calls (Mem. in Opp., pp. 2, 4)—ignores very pertinent circumstances: that the toll records disclosed were those of the subscriber Howard Garfinkel,[4] and that these toll records involved no credit card calls (82a). The circumstance that the telephone company allegedly received an anonymous letter complaining of the conduct of one subscriber's brother in New York, should hardly invade the right of other subscribers in New Jersey, including petitioner, to retain the privacy of the records of their telephone communications from the home number of the New York subscriber.[5]

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[4] Howard Garfinkel testified at trial that Merrill had used Howard Garfinkel's phone, located in Howard's bedroom, to make the calls reflected on Howard Garfinkel's toll slips. (244a, 260a). But even this information was unknown to the telephone company when it disclosed Howard's toll records to the F.B.I.

[5] The Government advances as another ground for admissibility, not advanced by it in the District Court, that the subscriber who receives the call has no standing to object to the telephone company's disclosure of its existence. But as stated by Judge Learned Hand in *United States* v. *Polakoff*, 112 F. 2d 888, 889 (2d Cir.), *cert. denied*, 311 U.S. 653 (1940): "It would deny all significance to the privilege created by § 605 to hold that because one party originated the call he had power to surrender the other's privilege." See also *United States* v. *Guglielmo*, 245 F. Supp. 534, 536 (N.D. Ill. 1965), *affirmed, sub nom United States* v. *Dote*, 371 F. 2d 176 (7th Cir. 1966), holding that both the callers and "their intended receivers" are within the protection of § 605. *Guglielmo* involved so-called "pen registers", which like toll slips, show only the number of the calling subscriber and of the receiving subscriber but not the contents of the communication.

The Government's contention (Mem. in Opp., pp. 2, 4), that the anonymous letter of May 2, 1963 justified the telephone company's disclosure of toll records to the F.B.I. on May 3, does not in any event dispose of all the toll records involved in the instant case. Some of the Garfinkel toll records admitted in evidence were prepared as late as July of 1963. (See, *e.g.*, Gov. Ex. 35, 526a-27a, which is dated 7-63.)

Moreover, even if the initial disclosure of the toll records—without any legal process—to the F.B.I. on May 3, 1963, were exempt from Section 605 as a telephone company "measure to protect its revenues" (see Mem. in Opp., pp. 4-5), it would still be necessary to determine whether Section 605 was violated by the introduction of these toll records into evidence at the trial of petitioner. For petitioner was charged with interstate gambling activities, not with defrauding the telephone company. The telephone company employee who identified the Garfinkel toll records at trial admitted that he had not produced them at trial pursuant to a subpoena. (273a-76a).

The Government's rationale for disclosure of the records of calls from Garfinkel's number (TR 9-3755) to Covello, cannot sustain an affirmance for a further reason: it has no possible application to the disclosure of the toll records of calls *from* Covello's home number, PL 9-2829. The Memorandum in Opposition is misleading in stating that "one Charles Muselli was listed as the subscriber to the former number [PL 9-2829]." (Mem. in Opp., p. 3.) The Government overlooks the stipulation, introduced in evidence by the Government at trial, that:

> "during the period about which there has been testimony or evidence concerning telephone calls

> thereto, the records of the New Jersey telephone company would indicate the following: . . . that telephone number PL 9-2829 was the home number of Joseph Covello, 25 Cottage Street, Belleville, New Jersey" (390a).

While there was an F.B.I. report for one period stating that "Telephone number PL 9-2829 is subscribed to by Charles Muselli, 25 Cottage Street, Belleville, New Jersey" (Gov. Ex. 43, 528a), a subsequent F.B.I. report stated: "Telephone number PL 9-2829 is subscribed to by Joseph Covello, 25 Cottage Street, Belleville, New Jersey" (Gov. Ex. 44, 531a.) The record also shows an F.B.I. request to the telephone company for a "Toll check on PL 9-2829 listed to Joseph Covello, 25 Cottage Street, Belleville, New Jersey." (Gov. Ex. 46, 538a.) Thus, even if calls from Howard Garfinkel's phone (TR 9-3755) to Covello's home (PL 9-2829) or his East Orange apartment (OR 6-1730) were not within the coverage of Section 605, the telephone company could not conceivably justify as "measures to protect its revenues" its actions in disclosing the toll records of calls *from* petitioner's home telephone, PL 9-2829. The introduction of these toll call records unavoidably raises the question of whether Section 605 applies—as the Sixth Circuit held and the Second Circuit denied—to telephone company records of subscribers' toll calls.[6]

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[6] The Memorandum in Opposition makes the unsupported suggestion that the objection to the toll records of calls from PL 2829 was abandoned on appeal. (See Mem. in Opp., p. 4.) But there was no conceivable reason to have waived such objection, and in the existing posture of the case when appellant briefed it, the admissibility of all the toll records would stand or fall together. The same oral opinion of the District Court, which was vigorously attacked on appeal, applied to all of the toll records in issue (401a-403a). Neither the District Court's opinion, nor the Gov-

The Government also suggests that this case does not present the issue of "Whether Congress inadvertently or otherwise amended Section 605 in 1968 to forbid disclosures in response to subpoena or demand of other lawful authority" (Mem. in Opp., p. 4, n. 3). But this issue, too, will be presented if the Court should grant certiorari and consider the award of a new trial. For at a new trial the 1968 amendment would (if petitioner's construction is correct) prohibit the Government from producing even under subpoena any telephone company toll records which might otherwise be admissible.

Respectfully submitted,

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ernment's argument for admissibility before the District Court, made any distinction as to the legal grounds for admitting the different categories of toll records (i.e. those of calls from the Garfinkel number and those of calls from petitioner's home number), so that appellant's attack on the District Court's ruling, if successful, would have resulted in a holding that all the toll records were inadmissible. A holding that the Garfinkel toll records were inadmissible would in itself have necessitated a new trial on all counts upon which petitioner had been convicted. However, the exhibits containing the records of the calls from petitioner's home number, PL 9-2829 (Gov. Exhs. 43, 44, 528a-36a), and the ruling admitting them (403a), were printed in the Appendix to Appellant's Brief, and cited in the body thereof (Appellant's Brief, p. 26).

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